

**STATE OF MICHIGAN**  
**DEPARTMENT OF LABOR AND ECONOMIC GROWTH**  
**OFFICE OF FINANCIAL AND INSURANCE SERVICES**  
**Before the Commissioner of Financial and Insurance Services**

**Judy Carey,**  
**Petitioner**

**v**

**Case No. 07-657-L**  
**Docket No. 2007-603**

**Office of Financial and Insurance**  
**Services,**  
**Respondent**

**For the Petitioner:**

**John Boyko (P32375)**  
**Day & Sawdey PC**  
**825 Parchment Drive SE, Suite 100**  
**Grand Rapids, MI 49546**

**For the Respondent:**

**Marlon F. Roberts (P68523)**  
**Office of Financial and Insurance Services**  
**611 W. Ottawa, 3rd Floor**  
**Lansing, MI 48933**

**Issued and entered**  
**this 7th day of January 2008**  
**by Ken Ross**  
**Acting Commissioner**

**FINAL DECISION**

This case concerns the applicability of sections 1239 and 1205 of the Insurance Code to licensing decisions when an individual with a felony conviction applies for an insurance producer license. The pertinent portions of these provisions are reprinted below. Section 1239 provides:

(1) In addition to any other powers under this act, the commissioner may place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions for any 1 or more of the following causes:

\* \* \*

(f) Having been convicted of a felony.

Section 1205(1) provides:

A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

- (a) Is at least 18 years of age.
- (b) Has not committed any act that is a ground for denial, suspension, or revocation under section 1239.

The Petitioner applied for a resident insurance producer license in October 2006. The application was denied and Petitioner appealed. A hearing was held June 27, 2007. Parties filed post-hearing briefs and a Proposal for Decision (PFD) was issued October 30, 2007. In the PFD, the administrative law judge recommended that the Commissioner grant Petitioner a producer license. Respondent filed exceptions to the PFD.

The ALJ's recommendation was based on the fact that, in several instances in the recent past, the Office of Financial and Insurance Services had issued insurance producer licenses to individuals who, like Petitioner, had been convicted of felonies. The ALJ pointed out that these licensing decisions were contrary to an OFIS licensing decision in which the Commissioner ruled that section 1205 of the Insurance Code required the denial of an insurance producer license to any individual with a past felony conviction. The ALJ wrote:

OFIS is a state agency. Decisions and actions of the Commissioner and the Licensing Division define agency standards. The decision of the Licensing Division to grant or deny licensure constitutes an interpretation and application of statutory provisions by OFIS, just as the Commissioner's decisions to grant or deny licensure speak for the agency. OFIS applies two different standards for

granting or denying licensure to applicants with the same qualifications and/or history (e.g. felony convictions). Until OFIS adopts and applies a single standard, each standard reflects an OFIS interpretation of Code Sections 1205 and 1239.

(Proposal for Decision, page 15)

The ALJ's recommendation is based on a misapplication of the licensing statutes and a misstatement of the clearly articulated policy of the Office of Financial and Insurance Services. The PFD is not accepted.

In the present case it was found that, in several instances, the OFIS staff had issued insurance producer licenses to individuals with felony convictions. Issuing these licenses does not, as the ALJ asserts, "constitute an interpretation and application of statutory provisions by OFIS. . . ." Since May 2004 when the Commissioner issued a final decision in *Mazur v Office of Financial and Insurance Services* (Case No. 03-384-L; Docket No. 2003-1515), it has been the formally stated policy of OFIS that insurance producer licenses should not be issued to individuals with felony convictions.

The licensing practices articulated in *Mazur* have been followed in each licensing decision other than those cited in the hearing record. Issuing insurance producer licenses to individuals with felony convictions in those cases constituted an error by the OFIS staff. When an error in licensing practices is discovered, the remedy is to correct the error, not to consider the error to be a precedent to be followed in subsequent cases. The licensing practice of this agency remains that which is articulated in the *Mazur* decision.

The Commissioner explained the specific application of the relevant Insurance Code provisions in the *Mazur* decision:

One attempt to bring harmony between [sections 1205 and 1239] is to conclude that the Commissioner must exercise the discretion conferred by Section 1239(1) in light of all the standards in Chapter 12, including Section 1205(1). That is, the Commissioner chooses to be guided by the clear standard of Section 1205(1) in her exercise of discretion.

Where harmony cannot be found between two conflicting statutes, then other principles of statutory construction emerge. The more recent statute may prevail over the earlier statute. The more particular provision may prevail of the more general provision.

Section 1205(1) and 1239(1) both became effective March 1, 2002, so this is no basis for deciding which governs. However, Section 1205(1) is particularly concerned with establishing standards for licensure. Section 1239(1) deals with general standards of conduct and remedies. Thus, it is appropriate for the Commissioner to be guided in this decision by Section 1205(1).

This interpretation of the Insurance Code, made by the Commissioner in a final decision, has the force and effect of law and remains the single authoritative statement of how licensing applications are to be processed when an applicant for an insurance producer license has a past felony conviction. As stated in *Detroit Auto Inter-Insurance Exchange v Commissioner*, 119 Mich App 113, 117-8 (1982):

True, respondent has the power and duty to promulgate rules enforcing the statute and carrying out its provisions. MCL § 500.210; M.S.A. § 24.1210. However, an administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute. Specifically, an administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings. The United States Supreme Court stated in *Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947):

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the

other is to exalt form over necessity.

Furthermore, in Bulletin 80-04 issued in 1980, the Commissioner explained what constituted authoritative statements of policy for the Insurance Bureau (the predecessor agency to OFIS):

The following constitute the only sources of a final and binding legal and policy position of the Commissioner of Insurance. Such positions are final and binding as to the situation in which they are taken until officially reversed or modified by a subsequent final and binding legal or policy position, or unless subsequently reversed or modified by a court of competent jurisdiction or a statutory revision. They are not, however, of legal precedent value in other matters pending before the Commissioner.

1. Final orders of the Commissioner.
2. Declaratory rulings of the Commissioner issued pursuant to Section 63 of the Administrative Procedures Act.
3. Official Bulletins of the Commissioner.
4. Written communications from officially designated or appointed Special Deputy Commissioners of Insurance or a First or Second Deputy Commissioner of Insurance acting for the Commissioner, when the written communication specifies that the written communication is executed by the person in his or her official capacity for the Commissioner.

Specifically, legal and policy positions set forth in an oral or written communication not identified above are not final positions of the Commissioner and are not legally binding on the Commissioner for any purpose.

The ALJ's reliance on a small number of erroneous license actions, taken in contravention of the *Mazur* decision, is misplaced. Section 1205 is the controlling statutory mandate in cases where an insurance producer application discloses a past felony conviction. That section requires that a license not be granted. While each application must be considered

on a case-by-case basis, one dispositive fact is whether the applicant was convicted of a felony. That fact is not in dispute in this case, so the Commissioner is required by section 1205(1) to deny the license.

The only finding of fact in the PFD necessary to this matter was the finding that the Petitioner committed a felony. The only necessary conclusion of law, made here, is that the application “shall not be approved” by the Commissioner under MCL 500.1205(1) in light of the felony conviction. The balance of the PFD is not essential to a final decision in this case. Those portions of the PFD are not adopted.

### **ORDER**

Therefore, it is ORDERED that the Petitioner’s application for an insurance producer license is denied.